United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18, 759

LOUIS Y. WILSON

Appellant,

v.

THE UNITED STATES OF AMERICA

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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Statements of Questions Presented

1. Whether appellant was improperly denied a preliminary hearing?

2. Whether appellant was improperly denied a speedy trial?

3. Whether the denial of appellant's motion for severance was prejudicial error?

4. Whether appellant was denied a fair and impartial hearing?

(a) Whether the Court erred in ordering that appellant be brought to the courtroom in blankets and chains, and whether it was error for the jury panel and the witnesses to see appellant brought before them in blankets and chains?

(b) Whether it was error to permit three jurors, who had knowledge of prejudicial newspaper publicity to remain on the jury?

(c) Whether the failure to grant a separate trial resulted in prejudice?

(d) Whether treatment of counsel and comments by the trial court were beyond the bounds of permissible participation?

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,759

LOUIS Y. WILSON,

APPELLANT,

v.

THE UNITED STATES OF AMERICA,

APPELLEE.

BRIEF FOR APPELLANT

Jurisdictional Statement

This Court has jurisdiction of the within appeal under Title 28, U.S.C. § 1291.

Statement of the Case

The records of the United States Commissioner (Commissioner's Docket 11, Case 194) reveal that the appellant, Louis Y. Wilson, was arrested on November 28, 1963 on a warrant which had been issued on November 22, 1964.

Appellant Wilson was apparently arrested as a suspect in connection with a robbery which occurred (near the hour of 1:45 p.m.) on November 21, 1 963. 1/ Two men took property valued at approximately $227. 42 from the M. Paul Hannan Real Estate Company located at 1515 17th Street, N. W. in the District of Columbia. The property, consisting of money, postage stamps, bus tokens, a maroon stamp box, a bank notice and a brown paper bag, was taken in the presence of three employees, John S. Rutkowsky, Deborah M. Housden and Arnold R. Donahue (Tr. 42, 95, 96). 2/

The codefendant below, James O. Wynder, was arrested a few minutes after the robbery on November 21 following a police description broadcast. At the time that the defendant Wynder was apprehended, the stamp box, money, a brown paper bag and the bank notice were recovered (Tr. 174, et seq.). Over the objection of defense counsel, the police officer was permitted at the trial to repeat admissions made by codefendant Wynder at the time of his arrest which tended to implicate himself but did not identify his accompliace (Tr. 182, 185, 186).

1/ No police officer testified at the trial concerning Wilson's participation in the robbery or the facts and circumstances leading to his arrest.

2/ Tr. references are to pages of the transcript of trial held on May 27, 1964.

The entire robbery referred to above took place during a three to five minute interval (Tr. 55, 111, 134). At the time of the trial all three of the employees stated that one of the men who had committed the robbery was appellant Wilson. 3 / None of the witnesses again saw appellant Wilson in person until one week later on November 28 at the robbery squad at Police Headquarters (Tr. 49, 112, 122).

Appellant Wilson was arrested at approximately 7:30 on the morning of November 28 and was taken to Police Headquarters (p. 16). 4 / That same morning witnesses Donahue, Housden and Rutkowsky received telephone calls from the police requesting them to come to Police Headquarters in order to view the robbery suspect. The witnesses, as they arrived, were taken into a room in which Wilson was sitting by himself where they were permitted to view him for a short period of time.

Witness Housden testified at the trial that shortly after the robbery on the afternoon of November 21, she had been taken to the Robbery Squad Identification Bureau and requested to view certain color slides (Tr. 74). She did not at that time know Wilson's name; her description of the second robber to the Police Department,

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3 / A fourth witness Zimmerman also testified that he could identify both defendants. However, a reading of his testimony reveals many contradictions and inconsistencies which rendered his testimony of doubtful probative value.

4 / p. references are to the transcript pages of the hearing on appellant's motions before Judge Matthews on February 20, 1964.

other than items of clothing, was that of a Negro male, six feet tall with a long, square face (Tr. 74). Mrs. Housden was shown approximately 10 slides out of some 500,000 slides on file at the Identification Bureau (Tr. 74, 206). She testified that she did not identify the appellant by his clothes but by his face (Tr. 75). Witness Housden at the trial also testified that she had initially hesitated the first time through the slides, but was then able to identify the picture of appellant (Tr. 78)5 /She also testified that she was given no explanation as to why she was only shown ten photographs and further was not given any explanation as to why the appellant's photograph was one of the ten which she was permitted to view (Tr. 82). Witness Housden did not recall the facial characteristics of any of the other nine photographs. She further testified that in the past she had been mistaken in her identification of people (Tr. 87).

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5 / Q. Do you recall, Mrs. Housden, what the other nine photographs were that you were shown?
A. Just colored slides.
Q. Do you recall the facial features of any of the other nine photographs?
A. No, sir.
Q. Were there any other long, thin faces in any of the other nine photographs?
A. I believe there was one or two other ones because I hesitated and then I definitely picked Mr. Wilson out.
Q. Which number in the series was Mr. Wilson's photograph?
A. Well, I picked Mr. Wilson and then I said, well, let's go on and I will be sure. And then they backed up. I believe I went about two pictures ahead and then I backed up again and I asked him to back up to Mr. Wilson's picture.
Q. Did you see all of the photographs that the Police Department had?
A. No, sir. They had a big slide of them. I don't know how many they had, but I didn't go through the complete case of them. Tr. 78

The record indicates that based upon Mrs. Housden's identification the arrest warrant for the appellant was issued (Tr. 44, 45). The record further indicates that shortly after the robbery and the above identification by witness Housden, the employees Rutkowsky, Housden and Donahue talked with each other concerning their experiences during and after the robbery (Tr. 133, 134).

On the morning of November 28, 1963, when these witnesses came to Police Headquarters to identify the robbery suspect, they were not required to pick appellant Wilson from any type of lineup (Tr. 84, 113, 137). It was brought out at the trial that all of these witnesses had talked with the police officers, the United States Attorney's Office and had reviewed their statements several times prior to trial, but that at no time would anyone of the witnesses talk with counsel for the defendants except during cross-examination in the conducting of the trial (Tr. 70, 110, 115, 116, 136).

There was no tangible evidence that was taken from appellant Wilson (Tr. 221). Therefore, the critical question for the jury in connection with weighing the evidence against appellant was the accuracy of the identifications made by the witnesses during the three to five minute time span of the robbery. All three witnesses testified that appellant was the man who committed the robbery. However, without exception their descriptions of his facial characteristics were of a generalized nature (Tr. 74, 75, 76, 77, 111, 114, 135). Each testified that they observed the man's face from a close distance. Yet it was pointed out to the jury through cross-examination that

not one of the witnesses, who were so positive in their identifications observed that the appellant had a heavy black mustache which dominated his face (Tr. 136, 240). Not one of the witnesses mentioned a large scar in the center of appellant's forehead (Tr. 240). Officer Dion of the Metropolitan Police Department Identification Bureau testified, after observing color photographs through a viewer, that on November 28, 1963 the appellant had a black mustache and, further, Officer Dion testified from a picture taken on March 12, 1963 that appellant had the black mustache on that date (Tr. 207).

The jury was apparently disturbed concerning the question of identification of the appellant and certain unexplained questions with respect to the witnesses' identification. The jury retired at 2:45 p. m. and at 3:50 p. m. the deputy clerk received a note from the jury which stated "Was the picture of Wilson identified on the 21st of November by the witnesses before he was identified in person on the 28th ?" (Tr. 263). The note was not answered, but following a statement by the Judge in open Court, the jury again retired at 3:55 p. m. and a second note was received at 5:10 p. m. indicating that the jury had come to a decision on the first count of robbery (Tr. 267). 6 /

Following the period of time on the morning of November 23,

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6 / Where a question of identification is involved it is especially important that the defendant be tried in an atmosphere of fairness and impartiality. See p. 26 , infra.

when appellant was caused to expose himself while sitting alone in the robbery squad room, he was returned to the cell block. He was subsequently taken before a United States Commissioner on the morning of November 29, 1963, some 24 hours after his initial arrest. The record contains no adequate explanation for the 24-hour delay before appellant was brought before the Commissioner.

At the hearing before the Commissioner, on the morning of November 29, 1963, appellant was represented by an attorney, purportedly engaged to act on appellant's behalf. A request was made at that time for an immediate hearing but there was no United States Attorney present. Since the Government counsel was not present a continuance was granted. The Commissioner then suggested that the hearing be continued to December 3, 1963 but appellant's counsel of record suggested that a preferable date would be December 10, 1963. On December 10, 1963 the same counsel again requested a continuance to December 17, 1963 (p. 28). The reason for the requested continuance was that the appellant was without funds and had been unable to raise money to pay to his, then attorney of record (p. 24, 25). The attorney of record did not desire to proceed further without his retainer (p. 25).

Prior, however, to the scheduled hearing on December 17, 1964, the Commissioner testified that he was approached by the above attorney at the counter in the U.S. Commissioner's hearing rooms and advised that the attorney had withdrawn from the case and would not be present at the hearing on December 17 (p. 28, 29). The attorney's reason

for withdrawing was that the appellant had been unable to obtain money (p. 25).

The appellant had witnesses available who were to testify on his behalf on November 29, 1963 and on December 10, 1963 (p. 25).

On December 17, when appellant was advised that counsel would not be present, he indicated a desire to proceed with the hearing (p. 29). However, the Government counsel stated that the matter had been presented to the Grand Jury and requested that the case be continued until after the first of the year. The Commissioner then continued the case to December 24, 1963 (p. 29). On December 24, 1963, the Commissioner then continued the hearing to January 14, 1964. On January 6, 1964, the Grand Jury indicted the appellant on charges of robbery and carrying a dangerous weapon. The proceedings before the Commissioner were dismissed as moot on January 10, 1964.

Present counsel was appointed by the Court below on January 15, 1964 and bail, after application therefor, was set on January 17, 1964 in the amount of $5,000.00. Prior to the setting of bail at $5,000.00, the Court was apprised of the fact that defendant would be unable to make bail in that amount.

Notice was received on January 28, 1964 that trial of the above defendant was set definitely for February 25, 1964, simultaneously with the trial of the codefendant, James O. Wynder.

However, telephone notice was received on Friday, January 31, 1964 that, pursuant to an order of Court, defendant James O. Wynder

had been sent for ninety-days mental observation. Further notice was given at that time that the trial scheduled for February 25, 1964 was continued and would not be re-scheduled until completion of the examination of defendant James O. Wynder.

In order to guarantee to defendant Louis Y. Wilson a prompt and speedy trial, an oral motion for severance was presented to the Court on January 31, 1964 at the time of considering defendant's pro se motion for reduction of bail. The motion for severance was denied.

Subsequently, on February 10, 1964 counsel filed on behalf of appellant Wilson a motion to dismiss for failure to grant a prompt and speedy trial. In support of the motion, counsel advanced in the written motion the argument that since the trial of defendant Louise Y. Wilson was definitely scheduled for February 25, 1964, the criminal docket would permit an expeditious scheduling of appellant's case. Counsel also pointed out on February 10, 1964, after an initial investigation, that the Government would most likely present only three or four witnesses, making the trial of either defendant alone a brief process, thus placing upon the Government and witnesses no undue burden if appellant were tried separately from defendant James O. Wynder. In addition, a motion was filed to dismiss the action for failure to grant a preliminary hearing. Both motions were denied. Thereafter additional motions for severance and prompt trial were filed on appellant's behalf 7 /

7 / See motions on file with official record with Clerk of this Court.

On May 27, 1964 appellant was brought before the jury panel and witnesses in blankets and chains (Tr. 3, et seq.). Immediately thereafter, a jury was empanelled. Following a trial of both defendants lasting two and one-half days, the jury found appellant guilty on Count 1 and not guilty on Count 2. On June 22, Judge Holtzoff sentenced appellant to 15 years imprisonment. On June 23, 1964 appellant was permitted to proceed on appeal in forma paupers from the judgment of the District Court.

Statement of Points

I

Appellant was Improperly Denied a Preliminary Hearing

II

Appellant was Improperly Denied a Speedy Trial

III

The Denial of Appellant's Motion for Severance was Prejudicial Error

IV

Appellant was Denied a Fair and Impartial Hearing

A. The Court Erroneously Brought Appellant Before the Jury Panel and Witnesses in Blankets and Chains.

B. Three Jurors had Knowledge of Prejudicial Newspaper Publicity.

C. The Failure to Grant a Separate Trial Resulted in Prejudice.

D. Treatment of Counsel and Comments by the Trial Court were Beyond the Bounds of Permissible Participation.

Summary of Argument

1. The holding of appellant who was unable to make bail for a period of five weeks and five days without either a Commissioner or a Grand Jury finding that there was probable cause to warrant detention is in violation of the Federal Rules of Criminal Procedure and is a deprivation of liberty without due process of law.

2. Upon the facts of this case the holding of appellant for a period of 182 days, during which period appellant was unable to make bail, before he was brought to trial, is a violation of appellant's Sixth Amendment right to a speedy trial.

3. The denial of appellant's motion for severance to enable him to obtain an early trial was error.

4. Appellant was denied a fair and impartial trial for the reasons that (a) appellant was brought before the jury panel and witnesses in blankets and chains; (b) two jurors and an alternate juror (who subsequently was seated on the jury) had knowledge of a newspaper story containing inadmissable and prejudicial evidence; (c) appellant was prejudiced by being tried with his codefendant; (d) treatment of counsel and comments by the Court during the course of the trial were beyond the proper bounds of judicial participation.

Argument

I.

Appellant Was Improperly Denied a Preliminary Hearing

That appellant Wilson never received a preliminary hearing is undisputed. As pointed out supra, page 2, . . the hearing on November 29, 1963 was continued because no U. S. Attorney was present (p. 28). The hearing scheduled on November 10, 1963, was continued at the request of an attorney nominally representing Wilson; this requested continuance however was for the purpose of enabling the attorney to determine if he would in fact represent appellant. When no money was forthcoming the attorney did not even appear at the hearing scheduled on December 17, 1964 (p. 25). There is no evidence of record that the said attorney in any manner acted in a representative capacity on appellant's behalf. (p. 24)

The Commissioner's testimony at the hearing on appellant's motion to dismiss reveals that appellant desired a hearing on December 17, 1964.

> Q. Was Mr. Kaiser present in the hearing room ?
>
> A. He was not, sir. After advising the defendant that Mr. Kaiser had withdrawn, I asked the defendant whether or not he wanted a hearing. He said that he wanted a hearing, he didn't want any counsel. But at that point, the Government

announced that the matter had been presented to a Grand Jury and for that reason I continued the matter to the date of December 23;, with the understanding if the Grand Jury had not acted by that time, the Government should be ready to proceed with a hearing. (p. 29)

The Commissioner's record of the proceedings on December 17, 1963 reveals that on that date the Government sought a continuance until after the first of the year for the reason that the "matter has been heard by a grand jury." Thus on December 17, the obvious intent of the Government counsel was to dispense with any preliminary hearing for appellant.

The Commissioner's record then reveals: "Case ctd to Dec. 24 -- if no return by G. J. before 24th -- that Def. would be given a hearing on 24th." However, on the 24th of December, the proceedings were continued to January 14, 1964. The proceedings were dismissed as moot on January 10, 1964 following return of the indictment on January 6, 1964.

The record discloses conflicting testimony with respect to the occurrences and reasons for continuance on December 24, 1964.

With respect to the hearing on December 24, the Commissioner stated for the record:

Q. Now, on the 24th, the matter was called again before you, was it not ?

A. On the 24th, the matter came up as previously scheduled. (p. 30)

He continued:

Q. What did the defendant Wilson say or do ?

A. Now, Mr. Wilson said he wanted a hearing. However, he said first of all he wanted a reporter and a stenographer present to record the proceedings. I advised Mr. Wilson that if he wanted a reporter there, he'd have to get one at his own expense, that the United States Commissioner's hearings were not covered by the reporters from the court system and I had no authority to bring a reporter there at the expense of the government. And after advising him of that, he looked around the room and he also noted that he did not see any of the complainants present in the hearing room. Well, I advised Mr. Wilson that regardless of who was there, the government had announced ready and we were ready to proceed to give him a hearing. He again indicated that he didn't see the persons who were alleged to have been robbed and that the witnesses who were present were officers and they were not the persons who were robbed and they couldn't give him a hearing, and he said he didn't want a hearing at that point and he never wanted a hearing as long as the government did not bring the actual complainants to the hearing room.

Q. Now, you mentioned there were police officers there. Do you recall specifically that the officers, themselves, were there ?

A. The officers were there, those were the witnesses that the government was ready to adduce as witnesses for the preliminary hearing.

Q. All right. Now, after the defendant, Mr. Wilson, indicated his desire to have the complainants there, what did he do then, if anything ?

A. Well, he indicated that that would not be a proper hearing without those complainants there and he walked out of the hearing room. (T. 30, 31) 8/

On February 20, 1964 Appellant Wilson testified in response to questions by the U. S. Attorney as follows:

Q. On the 24th, didn't the government announce that it was ready to proceed with the hearing ?

A. No, sir.

Q. Didn't you inform the Commissioner that you would not go ahead with the hearing unless all of the government witnesses were present, all of the government witnesses that might testify against you ?

8/ See also the Commissioner's record entry on December 24, 1964 on file with the Clerk of the Court.

A. Not exactly in that manner, no, sir.

Q. Well, just what did you say ? Tell us in your own words.

A. I asked the Commissioner if it would be possible that I maybe able to be afforded the time to obtain witnesses in my behalf that morning and to be able to secure a stenographer and a reporter, which I was willing to get the funds for.

I also told the Commissioner that morning that in view of the fact that he had already told me that a preliminary hearing would do me no good on the 17th and that he would call me back on the 24th to let me know what the Grand Jury had done about my case, as to whether they had indicted me or dismissed the case, I told the Commissioner that morning that I desired a hearing if I could possibly get witnesses in my behalf and if he would have the witnesses that were against me to appear. And the Commissioner told me that it wasn't necessary for him or the government to send for any witnesses against me.

Q. So you are testifying now that you did ask to have certain witnesses, who might testify against you, there ?

A. I definitely asked for the witnesses who were the complainants in the case, was it possible that they could be present.

Q. What did the Commissioner tell you with regard to that ?

A. The Commissioner said that it was not necessary for the government to do that.

Q. And with regard to your request for a stenographer, what did the Commissioner tell you about that ?

A. He said I didn't have to have one and that I could have a fair and impartial hearing without a stenographer.

Q. Didn't he tell you that if you wanted a stenographer, you'd have to provide one yourself ?

A. He said something to that effect, yes, sir.

Q. And after that, didn't you then refuse to go ahead with the hearing, and go back into the cell block ?

A. I told the Commissioner that being that there were no witnesses there against me and that I couldn't have time to obtain witnesses in my behalf, and that in view of the fact that he had waived and bind my case over to the Grand Jury, along with that of my co-defendant's, I felt as though he had informed me, himself, that a preliminary hearing at that time would do me no good, unless it was possible for me to be able to have witnesses there in my behalf.

Q. You say you felt this is what he meant, but he didn't tell you that in so many words --

A. He said it.

Q. -- did he ?

A. I beg your pardon ?

Q. You say you felt that was what he meant. He didn't tell you that in so many words, did he ?

A. That's what he told me.

Q. Didn't you then on the 24th refuse to go ahead with the hearing ?

A. I did not refuse.

Q. You declined the opportunity to go ahead ?

A. I told the Commissioner that I desired the hearing only if I could have a hearing according to that which is called for by law.

Q. In other words, you would not go ahead with the hearing unless all the government witnesses were there ?

A. It did not necessarily have to be all the government witnesses there, I never made a statement to that effect. I asked that I be afforded the opportunity to be confronted with the complaining witnesses in the event that since I was acting as my own attorney at that time, being that I did not have counsel, I asked the Commissioner that I would like to have the opportunity to be able to question the complaining witnesses against me.

Regardless of the reason, all persons were aware that a continuance on December 24th to January 14th would have the effect of denying to appellant a preliminary hearing.

Rule 5 (c) of the Rules of Criminal Procedure states:

> "If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf." (Emphasis Supplied)

During this period of almost six weeks appellant was unable to make bail. He was without any effective representation to act on his behalf and to obtain witnesses critical to his defense. Throughout the period he was incarcerated without any legal determination that there was probable cause to hold him.

This Court stated upon almost identical facts as to time of detention and lack of bail in Lloyd v. United States, 259 F. 2d 334, 335 (1956), that the record therein disclosed a serious violation of the defendant's statutory and constitutional rights. The Court stated:

> "Rule 5(c). Fed. R. Crim. P., 18 U.S.C.A. requires a United States Commissioner, unless preliminary examination is waived, to proceed with this important inquiry and hearing 'within a reasonable time.' And the purpose of preliminary hearing is such that a 'reasonable time' must be a short time." (Emphasis supplied).

This Court again stated on April 31, 1961, in Drew v. Beard, 290 F. 2d 741, 742 (1961):

> "...That persons accused of crime are entitled to prompt preliminary hearings pursuant to Rule 5 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and pursuant, also, to Rule 15 of the Rules of the Municipal Court for the District of Columbia; and that the fact that an accused is at liberty on bond does not in itself constitute a reason for denying him a prompt preliminary hearing, or postponing the hearing to a future date."

Chief Judge Bazelon in a statement filed April 30, 1964 in Louis Y. Wilson v. Anderson, stated:

> "Every arrested person has 'the right not to be held in the absence of a finding by the Commissioner of probable cause that he has committed an offense.' Giordenello v. United States, 357 U.S. 480, 484 (1958). Continued constraint of a citizen without such a finding is a deprivation of liberty without due process of law, in violation of the Fifth Amendment." 9/

Appellant was held for almost six weeks without any finding by a Grand Jury or a Commissioner that there was "probable cause" that he had committed an offense.

9/ Misc. 2269, United States Court of Appeals for The District of Columbia Circuit, Statement of Chief Judge Bazelon in Relation to Petition to Prosecute Appeal without Prepayment of Costs.

II

Appellant Was Improperly Denied A Speedy Trial

Appellant Wilson was taken into police custody and arrested on November 28, 1963. Finally on May 27, 1964 some one-hundred and eighty-two (182) days later appellant's trial was commenced. On June 1, 1964 the trial concluded and the jury convicted appellant on Count 1 of the indictment and acquited him on Count 2. Throughout this lengthy period appellant was in jail unable to make bail.

The Record discloses that no delay in the entire 182 days is attributable to appellant.

a. Present counsel was appointed on January 15, 1964.

b. Written notice was received on January 28, 1964 that the trial was set definitely for February 25, 1964.

c. Telephone notice was received a few days later on January 31, 1964 that the codefendant Wynder had been sent to Saint Elizabeth's for ninety-days and that the case was continued pending examination of appellant's codefendant.

d. Counsel for appellant immediately thereafter on January 31, 1964 presented to the motions judge an oral motion for severance on the ground that appellant would be denied a speedy trial. The motion was opposed by government counsel (p. 4).

e. On February 10, 1964 counsel for appellant filed a written motion to dismiss for failure to grant a prompt trial which

was denied. The motions judge in denying stated: ". . . so I think that very likely you could get to trial the last week of March," (p. 10).

f. On April 9, 1964, appellant filed a pro se motion to dismiss the indictment alleging as his grounds "the denial of a fast and speedy trial in the instant case."

g. On April 14, 1964, appellant filed a pro se petition for a writ of Habeas Corpus Ad Prosequendum demanding "that this Court bring your petitioner to trial immediately or that your petitioner be released forthwith."

h. On the afternoon of April 20, 1964 a jury was empanelled and the first witness testified in part. The following morning the Chief Judge declared a mistrial for the reason that the trial judge had become ill. The case was then referred to the assignment commissioner for the setting of a new trial date.

i. On May 1, 1964 appellant filed a pro se motion to dismiss for failure to grant a prompt trial.

j. A second trial appeared imminent on May 12, 1964 at which time the Governmentlearned that two police-officer-witnesses, Quinn and Spence, had become ill.

k. On May 18, 1964 counsel for appellant filed a motion to dismiss for failure to grant a speedy trial. In the motion counsel pointed out that the testimony of officers Quinn and Spence did not relate to the case of Wilson and would not be admissable if he were tried separately. It was also pointed out that had Wilson been tried

separately several months previously the trial most likely would have taken at most one and a half days. The record of the instant case affirms this statement. 10/

Thus through absolutely no fault of his own, appellant Wilson was incarcerated unable to make bail for over a half a year before he was finally tried. The facts are incontrovertible that appellant Wilson could have easily been tried by no later than February 25, 1964.

This court has recently considered the question of the right to speedy trial under the Sixth Amendment of the Constitution in Raymond Smith v. United States. 11/

The majority opinion in considering the right of a defendant to a speedy trial indicates that the balancing of the rights of public justice, and those of the accused will be upset against the Government only "where the delay has been arbitrary, purposeful, oppressive or vexatious". 12/

The majority opinion in the Raymond Smith case, supra then applied the "circumstances" of the case before the court to the above standard and concluded that the accused rights had not been violated.

However in the Raymond Smith case, the delay was substantially less than in the instant case and the majority opinion appears to attribute part of the cause for delay to the defendant's tactics and/or action

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10/ All motions referred to above are contained in the official record on file with the Clerk of this Court.

11/ United States Court of Appeals for the District of Columbia Circuit, February 20, 1964.

12/ Ibid, p. 7.

of his counsel. Such is not true here. Also in that case the appellant was indicted on November 13, 1961 and the matter of a speedy trial was not brought to the court's attention until March 15, 1962. In the instant case appellant was indicted on January 6 and the issue of speedy trial was presented to the court on January 31, 1961 and numerous times thereafter.

In the instant case there can be little doubt that appellant Wilson has been caused to remain in jail for months longer than was necessary for him to have been tried by a jury. Certainly, under any ordinary meaning of the words, the delay herein has been arbitrary, purposeful, oppressive and vexatious.

The Sixth Amendment of the Constitution provides:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . ."

The record herein reveals that appellant was denied a "speedy trial". A much earlier trial was both practicable and feasible and the decision to delay was erroneously made. 12 a /

III

The Denial of Appellant's Motion For Severance Was Prejudicial Error

There can be no doubt that denial of a motion for severance goes to the discretion of the trial court. However, it is submitted upon the facts herein that where two defendants are charged and one applies for psychiatric observation, an abuse of discretion results to the other defendant when he is made to await trial until that mental

12 a / Marshall v. United States. U.S. App. D.C. No. 18,047, June 30, 1964.

examination is concluded. Not to allow severance in these circumstances in this jurisdiction results in either one defendant languishing for three months in jail or a speeding up of the observation time of the other. 13/

13/ As pointed out infra p. 33, the failure to grant a severance was a contributing factor in creating a totality of circumstances making it impossible for appellant to receive a fair trial.

IV

Appellant was Denied a Fair and Impartial Hearing

As pointed out supra, p. 5 there was no tangible evidence taken from appellant. Further there were definite uncertainties and unanswered questions concerning the accuracy of the identification of appellant. It was vital that appellant's trial be conducted in an atmosphere of unbiased impartiality. As shown below the culmination of events was such that it was impossible for appellant to receive a fair and unbiased hearing by the jury.

A. The Court Erroneously Brought Appellant Before the Jury Panel and Witnesses in Blankets and Chains

At approximately 1:45 p.m. on May 27, 1964, in the presence of the prospective jurors and of witnesses subsequently introduced by the Government, the Deputy Marshall proceeded to the cellblock adjacent to the courtroom for the purpose of bringing the defendants into the Court for the empanelling of the jury.

Shortly thereafter the Deputy Marshall returned to the courtroom and approached the bench. Following a colloquy between the Deputy Marshall and the Court, the Deputy Marshall was requested by the Court to make a statement.

The Deputy Marshall left the bench, proceeded to the microphone located on the podium, and announced so that all persons in the courtroom could hear that the defendants had completely disrobed in the cellblock and refused to come into the courtroom.

The Court then ordered the Deputy Marshall to bring the defendants into the courtroom in blankets. In response to the Deputy Marshall's request, the Court informed him that the defendants could also be brought in in leg irons and handcuffs.

Following the Deputy Marshall's announcement and the Court's order the members of the prospective jury and other persons in the courtroom broke into loud tittering, laughter and conversation, and were admonished by the clerk to remain silent.

Counsel then requested permission to approach the bench, and there stated to the Court that the proceedings which had occurred in the presence of the prospective jurors were prejudicial to the defendants, in an attempt to indicate that the proposed bringing of the defendants into the courtroom under such circumstance would further prejudice them in the eyes of the jury. The Court stated that any prejudice to the defendants was the result of their own actions (Tr. 6).

Several Deputy Marshalls and two of the Government witnesses, officers of the Metropolitan Police Department whose assistance apparently had been requested by a Deputy Marshall, then entered the cellblock. During the twenty minute interval that followed, loud noises and shouts were heard on several occasions coming from the cellblock.

Following this interval, the defendants were brought into the courtroom by approximately eight Deputy Marshalls, clothed in grey blankets, wearing leg chains, handcuffs and chains around their middles.

Shortly thereafter counsel made oral motions for a mistrial, which were denied (Tr. 12)14/

The courts have uniformally recognized that serious prejudice results in the eyes of the jury when the accused is tried in chains.15/

Trial Court below specifically noted that the defendants had probably been prejudiced by bringing them into the Court in blankets and chains (Tr. 6).

This Court stated in Blaine v. U.S., 78 U.S. App. D.C. 64, 136 F. 2d 284-285 (1943):

> "In a criminal trial the right of the accused to appear before the jury without manacles has always been acknowledged and ought not to be denied except where the character of the accused and the danger of escape or disorder make a different course necessary."

14/The above facts are set forth in a motion for a mistrial signed by counsel for both defendants and filed on the morning of May 28, 1964 (Tr. 19, et seq.). The trial Judge wrote on the motion "Strike as inaccurate in fact and disrespectful to the Court", but did not state on the record in what manner it was inaccurate. The statement by the trial judge at Tr. 24 is not at variance with counsels' written statement.

15/Odell v. Hudspeth, 189 F.2d 300 (10th Cir 1951); Way v. United States, 285 F 2d 253 (10th Cir 1960); Guffey v. United States, 310 F 2d 753 (10th Cir 1962).

Of the three areas where the trial court has discretion to restrain the defendants, the only one here involved is the maintenance of a quiet and peaceable trial. While there can be no doubt that the defendants' conduct was indefensible, the course of action chosen by the trial court did not lend itself to a quiet and peaceable trial. When the trial court was informed of the defendants' conduct, we submit that the talismen should have been excused and the defendants given an opportunity to speak and to waive their right to be present during the trial. Counsel could not, of course, waive this right.16/ Appellant, through counsel, requested an opportunity to speak but that request was denied (Tr. 30).

Accordingly, it is submitted that it was an abuse of the trial court's discretion to try the defendants in blankets and chains in the circumstances noted herein.

16/ Cross v. United States, 325 F. 2d 629.

B. Three Jurors Had Knowledge of Prejudicial Newspaper Publicity

The conduct of the defendants at the outset of the trial received much notoriety. Newspaper articles concerning it were printed in both the Washington Post and the Washington Daily News. The language of the Washington Post story is here quoted:

> A pair of criminal defendants tried an unusual sartorial ploy yesterday to avoid being brought to trial on robbery charges - they removed all their clothes so they couldn't be brought into the courtroom.
>
> But U.S. District Court Judge Alexander Holtzoff was up to the challenge. The judge ordered the two men wrapped in blankets and restrained by handcuffs and leg irons.
>
> With the prospective jurors in their trial present, Louis Y. Wilson, 29, listed at 1916 13th st. ne., and James O. Wynder, 38, listed at 1310 G st., ne., shuffled meekly into the courtroom clad in a pair of gray blankets. They were surrounded by 12 deputy marshals.
>
> Marshals said the two men had removed all their clothes in the cellblock but later put on underwear and shoes when it became obvious that Judge Holtzoff was not going to postpone the trial.
>
> Wilson was quoted in the cellblock as saying he had appeared before Holtzoff in a previous case and did not wish to be tried before him. Wynder gave no explanation for his reluctance to go into Court.
>
> The two are charged with holding up the M. Paul Hannon Real Estate Co. at 1515 17th st. nw., and escaping with more than $200 last Nov. 21.
>
> As soon as they were brought into the courtroom yesterday. Court-appointed defense lawyers Bradley McDonald and Paul Driscoll went to the bench and asked for a mistrial on grounds that the appearance of the defendants would prejudice their case to the group of jurors assembled in the courtroom.

> Judge Holtzoff denied the request. He said that both defendants had removed their clothes in the cellblock and could not be brought in naked. (Emphasis supplied).

The following morning, upon request by trial counsel, the trial court asked the jurors if any of them had read the Washington Post item. Two jurors and one alternate juror indicated that they had (Tr. 32, et seq., 160).

As early as 1924, the Federal Appellant Courts were confronted with the problem of jurors learning improperly of prejudicial information through the newspaper media. In Griffin v. United States, 295 F. 437, the Third Circuit stated:

> "It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial."

This rule has recently been passed upon and refined both by this Court and the Supreme Court.

Judge Prettymen, speaking for this Court in Coppedge v. U.S., 106 U.S. App. D.C. 275, 272 F. 2d 504 (1959) noted:

> "It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial."

Thus, it can be seen that the trial court's admonition to the jurors at that time and his instructions thereafter did not cure this prejudice.

In Marshall v. U.S., 79 S. Ct. 1171, 360 U.S. 310, 3 L. Ed. 2d 1250, the Supreme Court found that the prejudice resulting from the perused newspaper stories had not been erased even where the trial judge took the jurors one by one in chambers and was assured by each that they could disregard the prejudicial information.

This was not a situation where the articles constituted a rehash of testimony heard in court. The article specifically noted that appellant had previously appeared before the trial court. If the jurors inferred from this information that appellant had a prior record, he was severely prejudiced. 17/ Appellant forwent his valuable right

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17/ The possibility of this inference was considerably strengthened by the following bench conference in the presence of the jury:

THE COURT: Of course, as you know, Mr. Terry, it isn't admissible for the Government to show that a person's picture was in the police files because that implies that he had a criminal record. There is no harm now because it was defense counsel who brought out from Mrs. Housden that she saw these and you were very careful not to bring it out. But I wouldn't emphasize it unnecessarily.

. . . . .

MR. McDONALD: Your Honor, one matter that concerns me, I believe it is entirely possible that the jury just overheard your remarks.

THE COURT: You say that again and I will punish you for contempt of court. Don't say those things. That is an insult to the Court.

MR. McDONALD: No, sir; I am just concerned.

THE COURT: You know, you have no right to talk that way to the Court. I think we better not have any bench conferences hereafter and anything you say you will have to say in open court.

I don't know what's the matter with young men of today, they have such bad manners, some of them.

That doesn't apply to you.

MR. TERRY: Thank you, Your Honor.

THE COURT: You are suggesting to the Court that the Court is speaking too loud at the bench conference. Well, we will have no bench conferences hereafter (Tr. 101, 102) (Emphasis supplied).

to testify in his own behalf for the purpose of not having his prior record pointed out to the jury. If the jury inferred that the defendant had been tried but not convicted earlier, then this was information that in no wise could be properly before the jury. Michelson v. U.S., 355 U.S. 469, 482, 69 S. Ct. 213, 93 L. Ed. 168 (1948). Prejudicial effect of past brushes with the law is notorious. Thurman v. U.S., 9th Cir. 1963, 316 F. 2d 205. It would be fatuous, indeed, to assign to the jurors the inference that the appellant's conduct was motivated by an appearance before the trial court in a civil matter.

C. The Failure to Grant A Separate Trial Resulted In Prejudice

The failure to grant appellant's Motions for separate trial not only resulted in considerable delay in the trial date but in addition appellant's rights to an impartial hearing were affected by the evidence admitted against his codefendant.

As pointed out infra p. 2 the evidence against appellant's codefendant was substantially different and stronger than the evidence relating to appellant. The entire testimony of officer Quinn including the admissions of defendant Wynder was admitted over the objection of appellant's counsel (Tr. 182, 186).

If the appellant had been tried separately the record reveals that the Government's case would have been substantially weaker. Conversely the fact that appellant was associated with his codefendant in the eyes of the jury by a joint trial could not help but adversely affect appellant in the minds of the jurors.

D. Treatment Of Counsel And Comments By The Trial Court Were Beyond The Bound Of Permissible Participation

It is suggested that a casual reading of the transcript reveals a grave departure, however well intended, from the recognized standard of judicial participation in conduct of criminal proceedings (Tr. 5, 6, 13, 25, 29, 43, 44, 45, 46, 47, 48, 59, 66, 67, 72, 73, 80, 81, 91, 92, 101, 102, 116, 127, 128, 130, 132, 139, 140, 151, 152, 153, 154, 155, 160, 161, 162, 163, 169, 170, 171, 174, 183, 184, 189, 190, 196, 202, 203, 204, 205, 225, 238, 240). 18/

The transcript citations above disclose numerous times when the trial court objected to defense counsels' questions without the Assistant United States Attorney objecting. Twice the trial court found defense counsel "in contempt". Both defense counsel, who were serving without pay were accused of being unethical by the trial court, at moments when the jury was in the court room. Once the trial court accused counsel of trickery and many times accused counsel of disrespect for the Court. Both defense counsel were called to the bench during their closing arguments. Healthy and aggressive defense in such an atmosphere is well nigh impossible.

The trial court's summary, discussion and comments on the evidence was practically a directive to the jury to return a guilty

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18/ While some of the above referenced remarks were made at bench conferences it is noted that defense counsel pointed out at the risk of the trial court's ire that the jury could in fact hear the trial court during such bench conferences (Tr. 101, 102).

verdict and was, if possible, more forceful than the closing argument of the prosecuting attorney (Tr. 256).

As Judge Prettymen pointed out in Billeci v. U.S., 93 U.S. App. D.C. 36, 184 F. 2d 394 (1950):

> "It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused."

CONCLUSION

In view of the foregoing, appellant respectfully requests that this Court vacate the judgement herein and dismiss the proceedings. In the alternative without in any way diminishing the prayer above it is requested that the within cause be remanded for a new trial or that this Court grant appellant such other and further relief as to this Court may seem just and proper.

Respectfully submitted

/s/ Bradley G. McDonald
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/s/ Edward M. Shea
Edward M. Shea
Counsel for Appellant

CERTIFICATE OF SERVICE

The foregoing Appeal was served upon Appellee by delivery of a copy thereof to the United States Attorney for the District of Columbia, United States Court House, Constitution Avenue & John Marshall Place, N. W., Washington, D. C., this 31st day of August, 1964.

Bradley G. McDonald

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,759

LOUIS Y. WILSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOHN A. TERRY,
GERALD E. GILBERT,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Appellant twice declined an opportunity to have a preliminary hearing, and eventually the proceedings before the Commissioner were dismissed after the purpose of a hearing had been eliminated by an indictment. In view of this was appellant "denied" a preliminary hearing, and even assuming he was, did that immunize him from being prosecuted pursuant to a valid indictment?

2. Was appellant denied a speedy trial where the time between indictment and trial was less than five months, and the only delays were caused by a mental examination of appellant's co-defendant, defense counsel being in trial, a mistrial just three and a half months after indictment, a nine day continuance because Government witnesses were ill, and normal calendar congestion?

3. Did the judges who ruled on appellant's several motions for severance abuse their discretion in denying appellant a separate trial from that of his co-defendant?

4. Was appellant denied a fair trial as a result of his own wrongdoings, a harmless newspaper article which the jury was instructed to ignore, and the court's insistence on proper courtroom procedure by counsel?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,759

LOUIS Y. WILSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and a co-defendant James Wynder were charged by indictment filed on January 6, 1964, with robbery and carrying a dangerous weapon. Trial by jury commenced on May 27, 1964. On June 1, the jury returned a verdict finding both men guilty of robbery, and finding the appellant not guilty of carrying a dangerous weapon. The Court directed a verdict of not guilty on the carrying of dangerous weapon count against Wynder. On June 22, 1964, appellant was sentenced to five to fifteen years imprisonment. From that judgment he appeals.

Pre-trial Hearing

On February 20, 1964, testimony was taken on appellant's motion to dismiss for failure to grant a preliminary hearing. (P-T,[1] Tr. 3-4, 8.) The testimony showed that appellant was arrested on a warrant on November 28, 1963. The following morning he was presented before the United States Commissioner in accordance with Rule 5(a), Fed.R.Crim.P., and the Commissioner advised him of his rights pursuant to Rule 5(b). There was no Assistant United States Attorney present. At that time appellant's counsel requested a preliminary hearing. The Commissioner suggested a continuance until December 3, since the Government's witnesses were not there but would be present on that date for a hearing in the case against Wilson's co-defendant. Appellant's counsel, however, advised the Commissioner that that date would not be satisfactory and suggested the date of December 10, one week later. This was agreeable to all concerned, and the case was continued until December 10.

On December 10, the Government announced ready for the hearing, but appellant requested a further continuance to December 17. On December 17, appellant's counsel withdrew. Appellant requested a hearing without counsel. The Assistant United States Attorney announced that the matter had been presented to the grand jury and requested a continuance until after the first of January. The Commissioner, however, granted a continuance for only one week, until December 24, and stated that if an indictment had not been returned by December 24, appellant would be given a hearing on that date. (P-T, Tr. 19-20, 27-29, 32.)

On December 24, no indictment having been returned, the Government announced ready for a preliminary hearing. Appellant refused a hearing claiming that none of the complainants was present and no stenographic reporter was present to record the proceedings. Appellant was

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[1] P-T refers to the transcript of appellant's pre-trial motions heard on February 20, 1964.

advised that the Government was ready and that the Commissioner had no authority to obtain a reporter for him. He persisted in his refusal and walked out of the hearing room. The hearing was continued to January 14, 1964. The proceedings were dismissed as moot on January 10, following a return of the indictment on January 6. (P-T, Tr. 21-23, 30-34.)

Trial

Immediately after counsel for the Government and both defense counsel announced ready for trial, and the jury panel was waiting, the Deputy Marshal informed the court that appellant and his co-defendant had disrobed and refused to come out of the cell block for trial. The court instructed the Marshal to wrap the appellant and his co-defendant in blankets and bring them out. (Tr. 3.) The appellant and his co-defendant were wrapped in blankets, leg irons, and handcuffs and brought into the court room. Counsel for appellant moved for a mistrial because of the way appellant was presented. The court denied the motion, stating that the defendant refused to put on their clothes, and that the court had been informed that they were difficult to handle unless handcuffs and leg irons or both could be used. The court said that it gave the Marshal the authority to use those restraints. (Tr. 12-13.)

The next day, prior to the presentation of any evidence, appellant again filed a motion for a mistrial based on the way the appellant was brought into the courtroom (Tr. 21). The court again denied the motion, stating that the motion contained a great many inaccuracies. The court further said that appellant and Wynder resisted the officers who wrapped them in blankets and scratched a couple of the officers who were given injections to prevent possible poisoning. (Tr. 24-25.) Appellant also renewed his motion to dismiss for lack of a preliminary hearing. The court denied the motion, saying that there is no rule of law holding that an indictment is invalid because there has been no preliminary hearing. Appellant also moved

to dismiss for a lack of a speedy trial, and also made other motions to sever the defendants and to suppress evidence. All motions were denied. (Tr. 28-30.)

The court's attention, was then directed to a newspaper article concerning the trial. The court said it would inquire of the jury, upon counsel's request, whether they had read the article. The court said it would also go further and instruct them to disregard it; however, it would not remove any juror who read it. (Tr. 31-32.) Co-defendants counsel indicated his preference that the jury's attention not be directed to the article. (Tr. 34.) The court made the inquiry requested by appellant's counsel, and two jurors and an alternate indicated that they had read the article. The court instructed them to completely ignore and disregard it, and reminded the jury if there be anything further during the trial published in the newspapers or mentioned on the radio or television, they were not to read or listen to it. (Tr. 35-36.)

The Government's evidence was overwhelming. It showed that appellant and his co-defendant entered the office of the M. Paul Hannan Real Estate Company in Northwest Washington on the afternoon of November 21, 1963. The appellant had a gun and told the three occupants of the office, Mrs. Housden, Mr. Rutkowsky, and Mr. Donahue, all employees of the real estate company, that it was a holdup. The appellant had nothing covering his face. Appellant ushered Mrs. Housden and Mr. Rutkowsky, at gun point, to the rear of the office where they joined Mr. Donahue. While appellant guarded these three people, his accomplice rifled through the safe, taking money and a maroon metal box labeled "Stamps" which contained loose change and stamps. These things were all put into a brown paper bag which appellant's accomplice, Wynder, was carrying. After appellant and Wynder fled the office, Mr. Rutkowsky and Mr. Donahue gave chase, and Mrs. Housden called the police. On the way out of the office Mr. Donahue informed Mr. Ralph Zimmerman, who was standing outside in front of the office, about the robbery. Mr. Zimmerman saw the two

men and he too gave chase. As Mr. Zimmerman got close to appellant and Wynder, the appellant turned toward him and told him not to get any closer. Mr. Zimmerman eventually lost Wynder, but he saw the appellant get into an automobile. Wynder was arrested a few minutes later and the police recovered the money and stamp box taken from the office, which Wynder was carrying in the brown paper bag. The money, metal box, and paper bag were received into evidence. After his arrest Wynder was immediately taken back to the real estate office, where he was identified by witnesses to the robbery. Shortly thereafter Wynder was identified by Mr. Donahue at police headquarters. (Tr. 39-49, 88-95, 117-122, 138-141, 143-144, 148, 182.) Private Edward Quinn, of the Metropolitan Police Department, testified that when he was arrested, Wynder said, "You got me," and that was all. He did not identify his accomplice. (Tr. 186.)

The appellant was positively identified from his photograph at police headquarters, which was brought out by defense counsel on cross-examination of Mrs. Housden (Tr. 73, 78). Appellant was also positively identified in person at the Robbery Squad a week after the robbery, by all three witnesses to the robbery and Mr. Zimmerman (Tr. 49-50, 82-84, 104-105, 111-113, 122, 137-142). Appellant was again positively identified by the witnesses at a previous trial which resulted in a mistrial (Tr. 51-52, 105, 122, 142). Finally appellant was again positively identified at trial by all three eyewitnesses and Mr. Zimmerman (Tr. 40-41, 91, 118-119, 134, 139-140, 145).

Throughout the trial the court instructed the jury that if there should be any newspaper notices or news broadcasts concerning the trial, the jurors were not to read or listed to them (Tr. 17, 156).

In his instructions to the jury, and at the request of defense counsel, the court included an instruction concerning the events at the start of the trial when appellant and Wynder disrobed to prevent themselves from being brought into the courtroom for trial. The court told the jury:

> Now this episode is a matter that should be of no interest or concern to the jury and in your deliberations or consideration of the case you should completely ignore it because, I repeat, the only question for you to determine is whether the defendants committed the crimes with which they are charged, and that question must be determined solely on the evidence introduced at this trial. (Tr. 248.)

The court commented on the evidence, and in doing so the court three times emphasized that what the court said about the evidence was not binding on the jury, and that if the jury's view of the evidence differed from the court's it was the jury's understanding and view that should prevail (Tr. 249, 256-259).

The court again reminded the jury to disregard any newspaper clippings, or any newspaper articles concerning the case, and told the jury "that all you must consider is the evidence you heard in the courtroom." (Tr. 262.)

STATUTE AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 8(b), Federal Rules of Criminal Procedure, provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged

> in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, Federal Rules of Criminal Procedure, provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

SUMMARY OF ARGUMENT

The appellant had two opportunities to have a preliminary hearing. On one occasion he requested a continuance, and on the other he walked out of the hearing room. Eventually, appellant was indicted, thereby eliminating any need for a hearing to establish probable cause, and the proceedings before the Commissioner were dismissed. The appellant was not denied the opportunity for a hearing. Even assuming *arguendo* that he was, the law is clearly established that there is no constitutional right to a preliminary hearing and the mere fact that a defendant does not have one does not make him immune from prosecution pursuant to a valid indictment.

Appellant relies completely upon an allegation of improper joinder as a basis for contending that he was denied a speedy trial. He has shown no oppressive design on the part of the Government in delaying his trial. Neither has he shown how a delay prejudiced him in any way at trial, nor is there any prejudice apparent from the record. There is no basis for "the balance between the rights of public justice and those of the accused" to be upset against the Government.

There is no question that the joint indictment of appellant and his co-defendant was proper. There was no abuse of discretion in the denial of a separate trial for

appellant. He has shown no prejudice which would have required severance. The trial court made an effort to minimize any possibility of prejudice. There is no indication that the jury was improperly influenced by irrelevant evidence in convicting appellant.

The appellant was given a fair trial. The allegations of his own wrong-doing and the court's demand for proper advocacy and procedure by counsel are not grounds for reversal. A newspaper article about the trial was harmless, and in any event the court's instruction cured any error.

ARGUMENT

I. Appellant was not denied a preliminary hearing, and even assuming he was, such denial did not make him immune from prosecution.

(See P-T Tr. 19-23, 27-34.)

Appellant was arrested on a warrant on Thanksgiving Day, November 28, 1963, the warrant having been issued on November 22. The following morning he was presented before the United States Commissioner in accordance with Rule 5(a), Fed. R. Crim. P., and the Commissioner advised him of his rights under Rule 5(b), Fed. R. Crim. P. There was no Assistant United States Attorney present. At that time appellant's counsel requested a preliminary hearing. The Government's witnesses were not there and the Government was not prepared. The Commissioner suggested a continuance until December 3, since the Government's witnesses would be present on that date for a hearing in the case against Wilson's co-defendant. Appellant's counsel, however, advised the Commissioner that that date would not be satisfactory and suggested the date of December 10, one week later. This was agreeable to all concerned, and the case was continued until December 10th.

On December 10, the Government announced ready for the hearing, but appellant requested a further con-

tinuance to December 17. On December 17, appellant's counsel withdrew, but the appellant requested a hearing without counsel. The Assistant United States Attorney announced that the matter had been presented to the Grand Jury and requested a continuance until after the first of January. The Commissioner, however, granted a continuance for only one week, until December 24, and stated that if an indictment had not been returned by December 24, appellant would be given a hearing on that date. (P-T Tr. 19-20, 27-29, 32.)

On December 24, no indictment having been returned, the Government announced ready for a preliminary hearing. Appellant refused a hearing, claiming that none of the complainants was present and no stenographic reporter was present to record the proceedings. The Commissioner again informed appellant that the Government was ready and advised him that he had no authority to obtain a stenographer. The appellant walked out of the hearing room and the hearing was continued to January 14, 1964. The proceedings before the Commissioner were dismissed as moot on January 10, following a return of the indictment on January 6. (P-T Tr. 21-23, 30-34.)

Appellant argues that he was denied opportunity for a preliminary hearing, but the facts do not support that assertion. It is undisputed that he had an opportunity for a hearing on December 10, and he requested a continuance. On December 24, he was given another opportunity and he refused that. He based his refusal partly on his opinion that the Government would not present the proper witnesses against him. An accused has no right to tell the Government how to prepare its case, nor should he be heard to complain about the competency and sufficiency of the evidence before there is any evidence. Another reason appellant refused his opportunity to have a preliminary hearing on the 24th was that there was no stenographer present. Occasionally it may be possible for the Commissioner to obtain a stenographer, however, there is no legal requirement for a stenographer and the

means of obtaining one are limited. The only method of obtaining one in a case such as this stems from a provision in the Manual for United States Commissioner at page 10 (1948), and is discretionary with the Commissioner. As Judge Burger stated in his concurring opinion in *Washington* v. *Clemmer*, —— U.S. App. D.C. ——, —— F.2d ——, petition for rehearing *en banc* denied (No. 18,602, decided June 12, 1964), in giving his reasons for voting to deny the petition, slip opinion at 12:

> The need for a verbatim report and transcript thus remains discretionary with the United States Commissioner or other judicial officer, his exercise of that discretion being reviewable by the District Court and by this Court.

The appellant's refusal to have a preliminary hearing on December 24 was his own choice. His reasons for that refusal are not authority for saying he was denied a preliminary hearing. Nevertheless, no matter who may be charged with the continuance on December 24, it is a fact that that was not appellant's only opportunity to have a hearing.

The only purpose of a preliminary hearing "as its history fully discloses,"[2] is "to determine whether or not there is probable cause to believe that an offense has been committed and that the defendant has committed it." *Barrett* v. *United States*, 270 F.2d 772, 775 (8th Cir. 1959); see *Barber* v. *United States*, 142 F.2d 805, 807 (4th Cir.), *cert. denied*, 322 U.S. 741 (1944). Thus, when the grand jury returned the indictment against the appellant, the indictment eliminated entirely the purpose of a preliminary hearing. *United States ex rel. Bogish* v. *Tees*, 211 F.2d 69 (3d Cir. 1954); *Davis* v. *United States*, 210 F.2d 118 (8th Cir. 1954); *Barber* v. *United States*, *supra*; see *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396 (1935).

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[2] *United States* v. *Lucas*, 13 F.R.D. 177 (D.D.C.), *aff'd*, 91 U.S. App. D.C. 278, 201 F.2d 182 (1952).

Appellant seems to be contending that because he was allegedly denied a preliminary hearing he was immune from prosecution. This contention is without authority and contrary to established law. There is no constitutional right to a preliminary hearing, and a defendant is not immune from prosecution because he did not have one. *Clarke* v. *Huff*, 73 App. D.C. 351, 119 F.2d 204 (1941); *Odell* v. *Burke*, 281 F.2d 782 (7th Cir.), *cert. denied*, 364 U.S. 875 (1960); *Barrett* v. *United States*, *supra*; *United States* v. *Heideman*, 21 F.R.D. 335 (D.D.C.), aff'd, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959); see *Goldsby* v. *United States*, 160 U.S. 70, 73 (1895). The indictment in this case was in no way connected with what did or did not occur before the United States Commissioner. As can be seen from the foregoing cases even assuming the truth of appellant's allegation that he was denied a preliminary hearing, that would not be a basis to dismiss the indictment. It must be remembered that we are dealing with an alleged violation of a rule, not a constitutional right. "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States*, 273 U.S. 93, 95 (1927).

II. Appellant was not denied his constitutional right to a speedy trial.

It is clear that the right to a speedy trial is not an absolute right, but a right which depends upon the circumstances of each case. "The right of a speedy trial is necessarily relative. It is consistent with delays, and depends upon circumstances. It secures rights to a defendant. It does not preclude the right of public justice." *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905). No rights of an accused are infringed when there is an unavoidable delay in the administration of the courts which cause the defendant no prejudice. *King* v. *United States*, 105 U.S.

App. D.C. 193, 265 F.2d 567, *cert. denied*, 359 U.S. 998 (1959); *Porter* v. *United States*, 106 U.S. App. D.C. 150, 270 F.2d 453 (1959); see *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 323 F.2d 809 (1963). "[T]he authorities demonstrate that the balance between the rights of public justice and those of the accused has been upset against the Government only where the delay has been arbitrary, purposeful, oppressive or vexatious." *Smith* v. *United States*, —— U.S. App. D.C. ——, 331 F.2d 784, 787 (1964). A delay which is not purposeful or oppressive does not give right to a denial of the right to a speedy trial. *Smith* v. *United States, supra; Davidson* v. *United States*, 312 F.2d 163 (8th Cir. 1963); *United States* v. *Kaufman*, 311 F.2d 695 (2d Cir. 1963). A lapse of time between indictment and trial[3] violates the Sixth Amendment only where it is manifestly designed by the prosecution to oppress the accused. *Mattoon* v. *Rhay*, 313 F.2d 683 (9th Cir. 1963).

In the instant case the record reveals there is no purposeful or oppressive delay that could be attributed to the Government. A partial chronology of the case discloses:

January 6, 1964—Indictment filed.
January 14, 1964—Appellant's motion to dismiss indictment filed.
January 17, 1964—Appellant's motion for bond heard and granted.
January 24, 1964—Appellant's motion to dismiss indictment heard and denied.
January 27, 1964—Appellant's *pro se* motion to reduce bond filed.
January 31, 1964—Appellant's motion to reduce bond denied, and appellant's oral motion for severance because co-defendant undergoing mental examination heard and denied, by Judge Matthews.

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[3] Any delay between offense and indictment is not governed by the Sixth Amendment but only by the applicable statute of limitations. *Nickens* v. *United States, supra*, and cases cited therein; *Mack* v. *United States*, 326 F.2d 481 (8th Cir.), *cert. denied*, 377 U.S. 947 (1964).

February 10, 1964—Appellant's motion to dismiss for failure to grant prompt trial filed; appellant's motion to dismiss filed.

February 12, 1964—Government's opposition to motion to dismiss filed.

February 20, 1964—Appellant's motion to dismiss for failure to grant prompt trial heard, argued, and denied, and motion to dismiss heard and denied, by Judge Matthews.

March 10, 1964—Letter dated 3-4-64 from St. Elizabeths Hospital advising that co-defendant was mentally competent for trial.

April 6, 1964—Appellant's motion to suppress evidence and for severance filed.

April 9, 1964—Appellant's motion for severance heard and denied. By chief judge McGuire. Appellant's motion to dismiss indictment filed.

April 14, 1964—Appellant's motion for speedy trial filed, heard and denied. Appellant's motion to dismiss indictment heard and denied, by Chief Judge McGuire.

April 20, 1964—Trial commenced.

April 21, 1964—Mistrial declared by Chief Judge McGuire because trial judge was ill.

May 1, 1964—Appellant's motion to dismiss indictment filed.

May 6, 1964—Appellant's motion to dismiss indictment considered and denied by Chief Judge McGuire.

May 18, 1964—Appellant's motion to dismiss filed.

May 21, 1964—Appellant's motion to dismiss considered and denied, by Chief Judge McGuire.

May 27, 1964—Trial commenced.

Appellant might have gone to trial on or soon after April 9, 1964, except for the fact that his counsel was in trial in another case. Later co-defendant's counsel was in trial, which took the case up to April 20, 1964. (See co-defendant's motion to dismiss for lack of speedy trial filed May 26, 1964). The case came to trial on April 20, less than four months after the indictment, and a mistrial was declared on April 21, because the trial judge

had been taken ill. The delay until the next trial date was a matter of normal reassignment of the case with the exception of one continuance, which was the only delay in the entire proceedings for which the Government was responsible. That was a nine-day continuance because two of the Government's witnesses were ill, certainly a reasonable basis for a short continuance. It is apparent that the mistrial and the ensuing delay were unavoidable.

There is no indication, furthermore, that appellant was in any way prejudiced by the delay between indictment and trial. Neither appellant nor his co-defendant took the stand, and no witnesses were presented in their behalf. Appellant has not claimed any injury resulting from the absence of possible witnesses who might have been available had the case been tried sooner. The Government's case was strong and the record shows that the Government had nothng to gain by a delay. It is clear that appellant cannot show any oppressive design on the part of the Government, nor has he shown that the delay prejudiced him in any way at trial. Appellant's contention is based entirely upon an alleged improper joinder. On January 31, 1964, and also on February 20, 1964, appellant moved for a severance on the ground that he did not want to wait for his co-defendant's mental examination to be completed before going to trial. He had been notified that trial had been set for February 25, 1964, and he wanted to be tried on that date. The motion was denied. On March 10, 1964, just two weeks after the original trial date, the court received a letter from St. Elizabeths Hospital saying that appellant's co-defendant was competent to stand trial, and the case was put back on the calendar. But for his counsel's being in trial appellant may have gone to trial on April 9 or soon thereafter, approximately three months after indictment.

It is apparent from the record that the delay was not arbitrary, purposeful, oppressive, or vexatious. There is no basis for "the balance between the rights of public justice and those of the accused," of which this Court

spoke in *Smith*, *supra*, to be upset against the Government.

III. There was no abuse of discretion in the denials of appellant's motions for severance.

(P-T, Tr. 3-4, 8, Tr. 30, 182, 191)

Appellant and his co-defendant were jointly indicted for robbery and carrying a dangerous weapon. The Government's evidence showed that appellant and his co-defendant together robbed a real estate office. (See counterstatement.) There is no question that the indictment met the provisions of Rule 8(b), Fed. R. Crim. P. The general rule concerning joinder of defendants is that persons jointly indicted should be tried together. This is true even though admissions have been made by one defendant which are not admissible against the other. *Dykes* v. *United States*, 114 U.S. App. D.C. 189, 313 F.2d 580 (1962) *cert. denied*, 374 U.S. 837 (1963); *Hall* v. *United States*, 83 U.S. App. D.C. 166, 168 F.2d 161, *cert. denied*, 334 U.S. 853 (1948); *Lucas* v. *United States*, 70 U.S. App. D.C. 92, 93, 104 F.2d 225, 226 (1939).

Appellant's claim, therefore, must meet the standards for relief from joinder set forth in Rule 14, Fed. R. Crim. P., which restates the common law rule, that a motion for severance is a matter within the trial court's discretion, subject to review only for clear abuse. *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 349, 210 F.2d 29, 31 (1954). See also *Schaffer* v. *United States*, 362 U.S. 511, 513, 515-516, (1960); *Opper* v. *United States*, 348 U.S. 84, 95, (1954). Rule 14 requires an affirmative showing of actual prejudice to the defendant resulting from joinder. *Schaffer* v. *United States*, *supra* at 515-516.

The chronology of this case (see pp. 12, 13, *supra*) shows that two different judges denied appellant's motions for severance prior to trial, and the trial judge also denied

appellant's motion for severance. (Tr. 30.) The circumstances and facts of this case reveal that appellant has failed to demonstrate any abuse of discretion by the court in denying these motions. Indeed, there was good reason for all three judges to concur in their denial. On January 31, 1964, and again on February 20, appellant in his motion for severance contended that he should not have to wait for his co-defendant's return from a mental examination and insisted that he should go to trial on February 25, the originally scheduled trial date. The motion was denied. (P-T, Tr. 3-4, 8). As it turned out his co-defendant was available for trial just two weeks after the original trial date and the case was put back on the calendar. Appellant shows no prejudice resulting from that delay to support his contention that he should not have been tried with his co-defendant.

Later, appellant based his motions for severance on grounds that there was more evidence against his co-defendant than against him, and that there was evidence which could not be introduced against him if he were tried separately. The fact that a defendant might have had a better chance of acquittal if tried separately is not a sufficient basis for severance. Neither is the fact that evidence against one defendant is incompetent against the other, as long as the court instructs the jury accordingly. *Robinson* v. *United States, supra.* See also *Hall* v. *United States, supra.* When testimony was introduced involving evidence and a statement taken from appellant's co-defendant at the time of the latter's arrest, the court instructed the jury that that testimony was admitted against the co-defendant only and not against the appellant. (Tr. 182.) Again, in open court the court remarked that that testimony was directed only against the co-defendant. (Tr. 191.) There was no evidence admitted against his co-defendant (not admissible against appellant) which implicated the appellant in any way. The court showed its carefulness in keeping out any such prejudicial evidence when the prosecutor was asked about anticipated testimony concerning a state-

ment made by the co-defendant. The testimony was eventually admitted, since the co-defendant's statement was merely to the effect that "You got me," and that was all. (Tr. 186.)

Appellant has shown nothing to compel severance in this case, and certainly there was no clear abuse of discretion.

IV. Appellant was given a fair trial.

(Tr. 3, 12-13, 17, 24-25, 31-36, 43-46, 56, 98, 101, 185, 249, 256-259, 266-267)

a. *Appellant's own wrongdoing did not create reversible error.*

While in the cell block waiting to come into the courtroom for trial the appellant and his co-defendant took off their clothes. When informed of this the court instructed the Marshal to wrap the defendants in blankets and bring them out. (Tr. 3.) The Marshal informed the court that the defendants could not be handled unless handcuffs and leg irons could be used. The court gave the Marshal authority to use those restraints. The appellant and his co-defendant were brought into the courtroom in blankets, leg irons, and handcuffs. Appellant's counsel moved for a mistrial, which was denied. (Tr. 12-13.) The next day appellant's counsel again moved for a mistrial, and again it was denied. The court informed appellant's counsel that in the process of being brought into the courtroom, the defendants had assaulted a couple of the Marshals who had to receive medical treatment. (Tr. 24-25.) At the close of the trial, and at the request of appellant's counsel, the court instructed the jury that the incident should be of no concern in determining a verdict, and that it should be completely ignored. (Tr. 248.)

As shown by the cases cited by appellant, it is clear that whether a defendant should be brought into a courtroom at the beginning of trial in manacles in presence

of the jury is a matter within the trial court's sound discretion. Ordinarily it should not be done except in certain circumstances, as where the character of the accused makes it necessary to maintain a quiet and peaceable trial. *Blaine* v. *United States*, 78 U.S. App. D.C. 64, 136 F.2d 284 (1943); *Guffey* v. *United States*, 310 F.2d 753 (10th Cir. 1962); *Way* v. *United States*, 285 F.2d 253 (10th Cir. 1960); *Odell* v. *Hudspeth*, 189 F.2d 300 (10th Cir. 1951). Certainly under these principles it could not be said that the court abused its discretion where the defendants disrobed in the cell block and then assaulted two officers who tried to bring them out. As the court stated in *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir. 1963), in upholding the trial court's action in having the defendants gagged and chained during trial:

> Law enforcement and fair trial for those accused of violations is not to be limited to the pattern chosen by defendants. The administration of criminal justice in the federal courts will not be delivered into the hands of those who could gain only from its subversion. 319 F.2d at 931.

This Court in *Cross* v. *United States*, —— U.S. App. D.C. ——, 325 F.2d 629 (1963), remarked that no case has ever suggested that a defendant in custody, other than by escaping, can "voluntarily absent" himself from trial. In the *Cross* opinion the Court cited *Falk* v. *United States*, 15 App. D.C. 446 (1899), *appeal dismissed*, 180 U.S. 636, *cert. denied*, 181 U.S. 618 (1901), which involved a defendant who absconded during the trial. The Court in *Falk* made the following statement which is quite appropriate to the instant case:

> In our opinion, there is no question of waiver here of any right. The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings

> of courts and juries and turn them into a solemn farce and ultimately compel society, for its own safety to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. . . . The constitution was not intended to shield the guilty from the consequences of crime, but to protect the innocent. 15 App. D.C. at 460-461.

b. *The newspaper article was harmless, and any error was cured by the court's instruction.*

A newspaper account of what occurred at the outset of the trial appeared in a local newspaper. Appellant's counsel did not move for a mistrial but requested the court to strike any jurors who read the article. In the alternative the court was requested by appellant's counsel to inquire whether any jurors had read the article and to instruct them to ignore it. Co-defendant's counsel indicated that he preferred the jury's attention not be directed to the article. The court said that it would not strike any jurors; however, appellant's other request was granted. The court made an inquiry of whether anyone of the jurors had read the article. Two jurors and an alternate replied that they had read it, and the court instructed them to completely disregard and ignore it. (Tr. 31-36.) The language in the article which appellant contends was prejudicial refers to appellant saying that "he had appeared before [the trial judge] in a previous case and did not wish to be tried before him." The remainder of the article was merely an account of what took place at trial.

The trial judge has broad discretion in ruling on the issue of prejudice from the reading of newspaper articles concerning the trial. *Marshall* v. *United States*, 360 U.S. 310 (1959). This Court in *Coppedge* v. *United States*, 106 U.S. App. D.C. 275, 272 F.2d 504 (1959), reversed a conviction on the ground that a newspaper article contained prejudicial facts about the defendant. That article

referred to defendant's serving time for assault, and also stated that the prosecutor was of the opinion that the defendant was a vicious criminal. This Court was also concerned about the lack of admonitions to the jury. The circumstances in the instant case are considerably different from those in *Coppedge*. In this case the only language which was allegedly prejudicial refers to appellant having been before the trial judge in a previous case. There is no mention of the capacity in which appellant appeared or his status at that time. Moreover, in this case the court throughout the trial admonished the jury not to read newspaper articles about the trial. (Tr. 17, 156.) Also in the final instructions to the jury, at the request of appellant's counsel, the court again instructed the jury to ignore any newspaper clippings or articles concerning the case and to decide the case only on the evidence at trial. (Tr. 262.) Appellant's counsel made no motion for a mistrial on these grounds. Although the request to strike the jurors was denied, the court gave the instructions requested by appellant's counsel. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the present day conditions. *Cohen* v. *United States*, 297 F.2d 760, 763 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962).

Appellant was convicted of one count and acquitted of the other, and there is no showing that the article prejudiced appellant in any way. The Government's evidence was strong and any prejudice from the newspaper article, in light of the many admonitions and instruction from the court, was at most harmless error. In any event it cannot be said that the court abused its discretion. In each of the following cases potentially prejudicial newspaper articles have appeared during the course of a trial, and no prejudice giving rise to reversible error was found. *United States* v. *Gibas*, 300 F.2d 836, 840 (7th Cir.), *cert. denied*, 371 U.S. 817 (1962); *Cohen* v. *United States*, *supra*; *United States* v. *Coduto*, 284 F.2d 464, 468 (7th Cir. 1960), *cert. denied*, 365 U.S. 881 (1961); *Massicot* v. *United*

States, 254 F.2d 58, 64 (5th Cir.), *cert. denied*, 358 U.S. 816 (1958); *United States* v. *Pinna*, 229 F.2d 220, 228 (6th Cir. 1955).

c. The court's conduct and comments were proper.

By isolating portions of the transcript, appellant attempts to demonstrate that the trial court deprived him of a fair trial because of the court's treatment of his counsel at trial. Appellant has not specified any particular place in the trial where the court's conduct was erroneous, nor cited any authority for saying the court acted improperly. He merely makes a blanket accusation. However, a complete reading of the record shows that the challenged conduct of the court when taken in context of the entire trial, could not conceivably rise to the dignity of reversible error. Indeed, at one point the court assumed the role of associate counsel for the defense. (Tr. 185.) The court also admonished the prosecutor where necessary. (Tr. 43-46, 56, 98, 101, 185, 266-267). Actually the record reveals that the situations of which appellant now complains arose as a result of defense counsel's own improper procedure and mistakes. The court dismissed one count of the indictment against the co-defendant, and the jury found appellant not guilty of one count. There is no indication that the conduct of the court prejudiced the appellant in any way. "All too often, it seems, appellants like these become overcritical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause." *United States* v. *Breen*, 96 F.2d 782, 784 (2 Cir.), *cert. denied*, 304 U.S. 585 (1938); see *United States* v. *Liss*, 137 F.2d 995, 999 (2d Cir.), *cert. denied*, 320 U.S. 773 (1943). And see *United States* v. *Ross*, 321 F.2d 61, 66 n. 3 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963), where the Court affirmed despite the fact that the judge's comments rebuking counsel were uncalled for, noting that the Government's case was strong and that the "the judge's comments here did not reflect on the defendant's case so much as on the way it was being handled."

Appellant's complaint about the court's comment on the evidence is without merit. Three times the court emphasized that the jury's view of the evidence was controlling. (Tr. 249, 256-259.) Furthermore, appellant fails to show that any part of the court's comment was incorrect or unfair.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18, 759

LOUIS Y. WILSON

v.

THE UNITED STATES OF AMERICA

Apellee.

APPEAL FROM A JUDMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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INTRODUCTION

In so far as appellant is able to determine from the government's brief, the facts are clear and the parties are at issue.[1/] It is necessary to comment briefly in reply on (I) the failure to afford appellant a preliminary hearing, (II) the denial of appellant's right to a speedy trial and (III) the failure to afford appellant a fair trial.

I.

Denial of a Preliminary Hearing

The government does not dispute or deny that appellant was deprived of his freedom from November 28, 1963 until January 6, 1964 without any legal determination that there was "probable cause" for his continued restraint.

The record is clear that appellant repeatedly requested and made known his wishes for a preliminary hearing

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1/ Under the Rules of this Court the government brief was due on September 25, 1964. On that date a Motion was filed for extension of the filing date to September 28, 1964. Finally on September 30, 1964 counsel for appellant received in the mail a draft copy of the government brief, which contained on almost every page numerous hand written additions, deletions and corrections, which were in many cases difficult or impossible to read and/or understand. Of course, the time for filing a reply brief on appellant's behalf commenced to run. At last, on October 8, 1964 appellant's counsel received a printed copy of the brief, but attached thereto were additional changes. The result of the above made it very difficult to know exactly the government's position with respect to the issues herein.

at which time he desired to present witnesses on his own behalf and further desired the right of confrontation and examination of his accusers. The government does not on brief contend that appellant "waived" his right to a preliminary hearing as prescribed by Rule 5(c), thus admitting a denial of appellant's rights. Curiously enough, it's position seems to be that such a denial of valuable rights of an accused can be effected with impunity. Such a conclusion is untenable.

Most importantly, though, the government on P. 11 of its brief, characterizes the admitted denial of a preliminary hearing as merely "an alleged violation of a rule, not a constitutional right."

While such a denial of rights is admittedly a rule violation, it also involves a violation of the most fundamental right of citizens in a free society: That persons should not be held in police custody, deprived of their freedom, without a proper determination that there is legal cause for their continued detention. Incarceration under such conditions is a deprivation of liberty without due process of law and is a violation of the Fifth Amendment of the Constitution of the United States. 2/

2/ See P. 20 of Brief for Appellant filed on August 31, 1964.

II.

Denial of a Speedy Trial

The government on brief does not deny or challenge that appellant was in jail for over six months unable to make bail before he was brought to trial. Such a period of time constitutes a significant portion of appellant's probable remaining years of life.[3/]

The government does not deny on brief that appellant could have been easily and expeditiously tried on February 25, 1964. Likewise, the government does not deny that appellant's right to, and desire to have a speedy trial were early and promptly raised on January 31, 1964 and repeatedly thereafter. On each occasion appellant's pleas were denied and the decision against prompt trial consciously made.[4/]

3/ As pointed out in appellant's Motion to Dismiss, filed on May 18, 1964, the period of time appellant was in jail, awaiting trial, assuming he has a normal life expectancy, was more than 1.2% of his remaining life span.

4/ The government does not deny as set forth at P. 21 of appellant's brief, that no delay in the 182 days is attributable to appellant. Somewhat surprisingly, but perhaps understandable, the government is driven in its effort to place some blame on appellant, for the lengthy delay, to make the remarkable statements on P. 13 that "Appellant *might* have gone to trial *on* or *soon* after April 9, 1964. . . . " and again on P. 14 "But for his counsel's being in trial appellant *may* have gone to trial *on* April 9 *or soon* thereafter. . ." Such vague allegations in an attempt to mitigate the denial of constitutional rights are patently misleading and further are unsupported by facts.

The government on brief takes the surprising position that to hold an accused for over a six month period without bail before bringing him to trial is not oppressive. Such an observation can only have been made by someone writing at his office desk knowing that he is himself free to come and go as he pleases. It has oft been written, that a man's most priceless possession is his freedom. To treat such a gift in a manner as disclosed by the facts herein is unconscionable and unlawful.

Where, as here, an accused is held in jail for at least three months longer than is reasonably necessary for him to be brought to trial and where the delay is repeatedly brought to the court's attention, the inescapable conclusion is that the delay is "arbitrary, purposeful, oppressive or vexatious." Smith v. United States _____ U.S. App. D. C. _____, 331 F. 2d 784, 787 (1964).

III.

Denial of Fair and Impartial Hearing

(a) Use of Blankets and Chains.

Appellant fully appreciates that where defendants misconduct themselves during trial, the trial court must take whatever steps necessary to maintain the dignity of the court. That was the situation in United States v.

Bentvena, 319 F. 2d 916 (2d Cir. 1962), cited and quoted from by the Government.

However, that was not the situation here. Appellant's disrobing did not take place in the presence of the court or the potential jurors. At that juncture, the trial court had other alternatives. It is the failure of the trial court to avail itself of alternative action that appellant complains of. The action of the trial court needlessly and substantially prejudiced appellant in the eyes of the jurors.

(b) The Prejudicial Newspaper Article.

The Government points out that co-defendant's counsel preferred not to inquire if members of the jury had read the prejudicial newspaper article. How this aids the Government's argument escapes appellant. Be that as it may, the article noted that appellant, not his co-defendant, had appeared before the trial judge previously.

The Government cites five cases where "potentially prejudicial newspaper articles have appeared during the course of a trial, and no prejudice giving rise to reversible error was found."[5/]

5/ United States v. Gibas, 300 F. 2d 836; Cohen v. United States, 297 F. 2d 760; United States v. Coduto, 284 F. 2d 464; Massicot v. United States, 254 F. 2d 58; United States v. Pinna, 229 F. 2d 220.

In Gibas, it was found that the jury did not read the article. Two of the jurors read the article's headline, but that contained no prejudical information. In Coduto, the Court found that there was neither a showing that the jurors had read the article nor a request by trial counsel to interrogate the jurors on the subject. In Massicot, the jurors all swore that they hadn't read or heard the critical statement. Pinna was decided in 1956 prior to the Supreme Court's holding in Marshall v. States, 360 U.S. 310 (1959).

The Government's reliance to the point of quoting from Cohen points up the crucial difference in the cases relied upon by the Government and the situation common to Marshall, Coppedge[6/] and the case at bar. The language just preceding that quote states:

> "There is no showing that any juror read or even saw any of the offending articles; it is merely urged that they must have seen them. To so hold, we would have to presume that the jurors disregarded repeated and emphatic instructions by the Court. The presumption is the other way."

This and other language in the cases cited by the Government show that the Courts of Appeals stood ready to set aside the convictions where, as here, the articles

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6/ Coppedge v. United States, 106 U.S. App. D. C. 275, 272 F. 2d 504 (1959).

contained prejudicial information and it could be demonstrated that jurors actually had read the articles.

(c) Treatment of Counsel and Comments by the Trial Court.

The Government criticizes appellant's "isolating portions of the transcript" without specifying "where the court's conduct was erroneous." However, the Government gives no specific example to support such an allegation. It is believed that a cursory reading of the numerous cited pages of the transcript record demonstrates so thorough a saturation of the entire proceeding that "isolation" is impossible. However, only this Court is capable of a detached evaluation of this issue.

CONCLUSION

In view of the foregoing, appellant respectfully requests that this Court vacate the judgement herein and dismiss the proceedings. In the alternative without in any way diminishing the prayer above it is requested that the within cause be remanded for a new trial or that this Court grant appellant such other and further relief as to this Court may seem just and proper.

Respectfully submitted

/s/ Bradley G. McDonald
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/s/ Edward M. Shea
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CERTIFICATE OF SERVICE

The foregoing Reply Brief was served upon Appellee by delivery of a copy thereof to the United States Attorney for the District of Columbia, United States Court House, Constitution Avenue & John Marshall Place, N.W., Washington, D.C., this 14th day of October, 1966.

Bradley G. McDonald

MEMORANDUM IN SUPPORT OF APPELLANT'S
PRO SE PETITION FOR REHEARING EN BANC

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18759

LOUIS Y. WILSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18759

LOUIS Y. WILSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM IN SUPPORT OF APPELLANT'S
PRO SE PETITION FOR REHEARING EN BANC

Appellant and another were convicted of armed robbery in the United States District Court for the District of Columbia, after a joint trial before District Judge Holtzoff and a jury. This Court affirmed appellant's conviction on December 17, 1964 in a per curiam opinion by Judges Fahy, Washington and Burger. Appellant's pro se petition for rehearing en banc, notarized on December 29 (Pet., pp. 16, 17), was treated as timely by order of Chief Judge Bazelon and filed on January 4, 1965. The appeal of appellant's co-defendant (Wynder v. United States, No. 18758) is still

pending, having been argued on January 14, 1965 before Chief Judge Bazelon and Judges Fahy and Wright.

Grounds for the Petition

This case raises important and difficult questions under Rule 5 of the Federal Rules of Criminal Procedure which were passed upon only sub silentio by the division hearing this appeal. Prior decisions of the Court by different divisions suggest that it may be divided on some of these issues, including the interpretation of controlling en banc decisions. Other questions presented by this appeal are pending before a different division of the Court. And the decision of the division in the present case, if allowed to stand, will constitute an erroneous and potentially troublesome precedent in this Circuit.

1. Denial of a Preliminary Hearing. Appellant never received a preliminary hearing after his arrest, and he was imprisoned for nearly six weeks until an indictment was returned against him. When appellant sought to challenge his imprisonment in a habeas corpus proceeding brought pro se before trial, this Court denied him leave to appeal in forma

pauperis from the dismissal of his petition in the District Court. Wilson v. Anderson, _____ U.S. App. D.C. _____, 335 F.2d 687 (1964). The division hearing this appeal, however, discussed neither the lawfulness of appellant's detention nor its relevance to the validity of his conviction. These issues, forcefully argued to the division by appellant's prior counsel (Brief for Appellant, pp. 12-20) and contested by the Government (Brief for Appellee, pp. 8-11), were characterized by Chief Judge Bazelon in the course of the collateral pretrial proceedings as "[requir[ing] thorough consideration in the exercise of [the Court's] supervisory power over the processes of criminal justice." Wilson v. Anderson, supra, _____U.S. App. D.C. at _____, 335 F.2d at 691 (Bazelon, C.J. dissenting). En banc rehearing of this appeal would provide an appropriate vehicle for such consideration.

a. Appellant was arrested sometime between 7 and 8 A.M. on November 28, 1963 (P-T Tr. 16). The Government concedes (Brief for Appellee, pp. 2, 8-9) that he was first taken before the United States Commissioner some 27 hours later, in the midmorning of November 29; that he requested and was denied a preliminary hearing both at that time and on December 17, almost three weeks after his

arrest; and that the proceeding offered him by the Government on December 24 included neither the taking of a stenographic transcript nor the right to compel the appearance of the complaining witnesses.

We do not understand the Government to contest the unlawfulness of the first two denials; the failure of the December 24 offer to satisfy the requirements of Rule 5(c) is apparent from Washington v. Clemmer, No. 18602, D.C. Cir., May 11, 1964. The consequent unlawfulness of appellant's detention is therefore plain. During his illegal detention and prior to his initial appearance before the Commisioner appellant was observed, not in a lineup but sitting alone in a room at Robbery Squad Headquarters, by the witnesses who later testified against him at trial. The first identification of appellant by the witnesses was made at the Robbery Squad immediately following this observation.

Appellant's initial identification by the witnesses could plainly not have been put in evidence. Gatlin v. United States, 117 U.S. App. D.C. 123, 130, 326 F.2d 666, 673 (1963). The sole evidence linking appellant with the crime charged, however, was his later identification by these same witnesses in open court. This second identifica-

tion, appellant submits, was a foregone conclusion once the earlier identification had been made. The critical moment in the identification of appellant as a participant in the crime charged was his initial exposure to the witnesses' view. The possibility that the witnesses would retract their accusation at trial some five months later, when memories were sure to have dimmed, was plainly almost nonexistent; no reenactment of the initial identification could have been more than an echo.

The residual effect of the initial identification on subsequent reaffirmations is analogous to the residual effect of a confession obtained during a period of unlawful detention. Such confessions are not only themselves inadmissible, but are held to invalidate subsequent reaffirming confessions obtained after Rule 5 has been complied with as well. Killough v. United States, 114 U.S. App. D.C. 305, 315 F.2d 241 (1962) (en banc). Practical effectuation of the policies which underlie the exclusionary rule, the Court there held, requires a prohibition on the indirect use of illegally obtained evidence wherever indirect use can be discerned.

The division hearing this appeal, however, failed to consider the applicability of the Killough doctrine to

identifications as well as to confessions. Whether the Killough doctrine should foreclose indirect benefits flowing from a Rule 5 violation regardless of their form, is a question which warrants equally full consideration as the Killough case itself was given.

Rehearing en banc, moreover, would permit clarification of the impact of Killough on Payne v. United States, 111 U.S. App. D.C. 24, 294 F.2d 723, cert. denied, 368 U.S. 883 (1961). There a division of the Court refused to bar an eyewitness from identifying the defendant in open court merely because the witness had previously identified the defendant during a period of illegal detention. The earlier opinion of a different division in Bynum v. United States, 104 U.S. App. D.C. 368, 262 F.2d 465 (1958), however, sought to be distinguished in Payne, suggests a contrary view. For the fact that the reaffirming identification of a defendant by a witness occurs in open court would seem irrelevant to its admissibility if the rule is "that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused" (Bynum, supra, 104 U.S. App. D.C. at 370, 262 F.2d at 467 (emphasis added)). A third division of the Court suggested in

Smith v. United States, 117 U.S. App. D.C. 1, 326 F.2d 879 (1963), cert. denied, 377 U.S. 954 (1964), that the exclusionary rule would not bar the testimonial fruits of evidence obtained during a period of illegal detention if the volition of the witness had intervened and determined the content of his post-detention testimony. But still another division held in McLindon v. United States, 117 U.S. App. D.C. 283, 329 F.2d 238 (1163), that the exculpatory role of human volition would vary in different circumstances.

Appellant could not have been constitutionally convicted if the tainted open-court identifications had been excluded. Thompson v. Louisville, 362 U.S. 199 (1960). The conflict in the teaching of the foregoing cases on the admissibility of the identifications under Killough warrants resolution by the Court en banc. Western Pac. R. Corp. v. Western Pac. R. Co., 347 U.S. 274, 260 n.20 (1953).

b. Even apart from the actual effect of the Government's Rule 5 violation on the evidence against appellant, moreover, implementation of the rights conferred by the Rule requires that appellant's conviction be reversed.

Development of a means by which lawless police conduct can be prevented is of equal importance with the substantive standard of legality itself. Mapp v. Ohio, 367

U.S. 643, 655 (1961). The rule excluding illegally obtained evidence provides the means when official misbehavior determines the evidence submitted to the trier of fact. The exclusionary rule, however, rests not upon some supposed rational lacunae in convictions which follow the admission of illegally obtained evidence (Kotteakos v. United States, 328 U.S. 750, 764-65 (1946); Rogers v. Richmond, 365 U.S. 534 (1961); Fahy v. Connecticut, 375 U.S. 85, 95 (1963) Harlan, J. dissenting)), but rather upon the perception that police officers are unlikely to act lawlessly if their misbehavior is to no avail. "The rule is calculated to prevent, *** [and] its purpose is to deter -- to compel respect for the constitutional [or statutory] guaranty in the only effectively available way -- by removing the incentive to disregard it" (Elkins v. United States, 364 U.S. 206, 217 (1960)).

This rationale is clearly applicable whether or not police misconduct turns up evidence which is later used against a defendant. The "obvious futility" of independent sanctions against official lawlessness (Mapp v. Ohio, supra, at 642) may thus require, if such misbehavior is to be prevented, the reversal of convictions which conclude criminal proceedings unlawfully begun.

Nor should Rule 5 violations in the course of criminal proceedings necessarily be sanctioned upon the ground that their ultimate effect cannot clearly be discerned. Deterrence finds its justification "not only in assuring protection of the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society" (McNabb v. United States, 318 U.S. 332, 344 (1943)). As the Court recently noted, moreover, in Blue v. United States, No. 18401, October 29, 1964, pp. 10-11, petition for cert. filed pro se, December 21, 1964 (No. 813 Misc., O.T. 1964):

> "[C]riminal prosecution is a continuous and unitary process, and * * * each stage has its own intrinsic importance as well as a frequently significant relationship to the final result. Preliminary inquiries can on occasion have great value for one charged with crime. Where a defendant is denied out of hand the opportunity to * * * [utilize] that value, we do not think that that denial is to be swept under the rug of a grand jury indictment. * * * [R]elief in such a situation is not to be foreclosed solely by reason of an intervening indictment."

Appellant here, for example, was plainly entitled to be taken before the Commissioner long before the time the witnesses appeared at the Robbery Squad to identify him, and to confront his accusers at a preliminary hearing before

their testimony became effectively unchangeable. If such a hearing had been held, and the witnesses -- whose testimony was the sole evidence against appellant -- had been produced, appellant might well have succeeded in shaking the certainty of their identification. Cf. Washington v. Clemmer, No. 18602, D.C. Cir., May 11, 1964; United States v. Langsdale, 115 F. Supp. 489 (W.D. Mo. 1953), appeal dismissed on motion of the United States, 209 F.2d 955 (8th Cir. 1954), where at the preliminary hearing the defendant refuted the Government's claim of probable cause for the issuance of a warrant. The Government's disregard of Rule 5 thus in fact seriously prejudiced appellant's defense.

Finally, the very establishment by Congress of the requirement of a prompt preliminary hearing should make the courts slow to assume that denial of the right conferred has worked no prejudice. Congress has conclusively declared that fairness in the administration of justice requires the interposition of a judicial officer between the police and the citizen before detention can be permitted. McNabb v. United States, 318 U.S. 332, 341-344 (1943). When Congress has so determined, it is not for the courts to review the legislative judgment. Cf. Eastern States Retail Lumber

Dealers' Ass'n v. United States, 234 U.S. 600, 613 (1914); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211 (1959); Radovich v. National Football League, 352 U.S. 445, 453 (1957); United States v. Line Material Co., 333 U.S. 287, 310 (1948).

A solution to the problem of evidentiarily sterile Rule 5 violations is peculiarly important to the administration of criminal justice in this Circuit. Since Rule 5 applies to all prosecutions in the District of Columbia, the need for its effective enforcement here is uniquely pressing. This Court should therefore undertake to fashion a technique for preventing violation of Rule 5 which does not depend upon the happenstance of evidentiary fruitfulness.

In Blue v. United States, supra, a division of the Court held that the remedy is pretrial habeas corpus. Whether or not this is correct as a general proposition, however, cases may arise -- like Blue itself -- in which the suggested remedy is inadequate. The present case is one example: appellant in fact sought the Great Writ prior to his trial, but was denied leave to appeal in forma

pauperis from its denial. Wilson v. Anderson, _____ U.S. App. D.C. ____, 335 F.2d 687 (1964).

The opinion of the division hearing this appeal never addressed itself to the Rule 5 problems raised by such cases. If the division meant to reject sub silentio the approach taken in Blue -- searching the record for prejudice in the conduct of the defense --, then the Court en banc should resolve the conflict. On the other hand, the silence of the division may imply a finding that no such prejudice could be found in the present case and that appellant's failure to receive a prompt preliminary hearing is therefore of no moment in view of his subsequent conviction after indictment. In that event, even if the division were correct, this case is plainly one for en banc reconsideration. For the combined effect of Blue and the opinion of the division here would then be to reduce violations of Rule 5 to the level of technical defects in pleading, at least in cases where pre-trial habeas corpus is for some reason unavailable. "Such a proposition is, we believe, incompatible with the importance which Congress, in this jurisdiction at any rate, has attached to these preliminary proceedings * * *" (Blue, supra, p. 10). The same importance warrants consideration of these issues by the entire Court.

2. Denial of a Fair Trial. The sole issue discussed by the division hearing this appeal was the error of the District Court in permitting appellant to be tried while sitting before the jury bound with leg irons and manacles, clad only in blankets. The division held that while the District Court had erred, the error was harmless in view of the strength of the Government's case.

The right to a fair trial, however, is constitutionally based, and its denial should not lightly be excused in the name of the "harmless error" doctrine. Only last Term the Supreme Court intimated its doubt that errors of constitutional magnitude "can ever be subject to the normal rules of 'harmless error'" (Fahy v. Connecticut, 375 U.S. 85, 86 (1963)). Reliance upon the "harmless error" doctrine to defeat claims of unconstitutionality such as those advanced by appellant before the division raises a number of fundamental issues worthy of consideration by the Court en banc. The opinion of the division, moreover, if allowed to stand, may unduly fetter the consideration of these issues by the division which heard the appeal in Wynder v. United States, No. 18758.

a. The implicit condonation of unconstitutional prosecutorial behavior which flows from "harmless error"

affirmances suggests that the doctrine should be inapplicable when constitutional rights have been denied. See Kotteakos v. United States, 328 U.S. 750, 764-65 & n.19 (1946); Fahy v. Connecticut, 375 U.S. 85, 86 (1963). A similar rule should apply to unconstitutional action by the courts themselves, for "no distinction can be taken between the Government as prosecutor and the Government as judge" (Elkins v. United States, 364 U.S. 206, 223 (1960), quoting Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J. dissenting)). Indeed, the inapplicability of the "harmless error" doctrine to cases of judicial denials of constitutional rights may be even more strongly compelled, "by a decent regard for the duty of courts as agencies of justice and guardians of liberty" (McNabb v. United States, 318 U.S. 332, 347 (1943)). The importance of this issue to the proper administration of criminal justice in this Circuit warrants the attention of the entire Court.

b. In any event, however, in relying upon the alleged clarity and strength of the Government's proof to justify affirmance notwithstanding the error found, the division hearing this appeal has put a novel and disturbing gloss upon the "harmless error" doctrine. The theory of

"harmless error" is that some mistakes may be so peripheral, or so obscure, or so inherently lacking in capacity to impress the jury, that they could not reasonably have affected the decision. "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." Kotteakos v. United States, 329 U.S. 750, 764 (1946) (emphasis added). The standard may be difficult to apply "when the sense of guilt comes strongly from the record", but the question must still be whether "the error did not influence the jury, or had very slight effect" (ibid.).

The District Court, whose finding in this respect is entitled to great weight (Marshall v. United States, 360 U.S. 310, 312 (1959); Webb v. United States, 191 F.2d 512, 516 (10th Cir. 1951)), found that prejudice against appellant had been created by his presence before the jury in chains and blankets (Tr. 6). The division of this Court agreed, denouncing the unnecessary conduct of trials under such conditions "because of their tendency to prejudice the accused in the eyes of the jury" (Op. 2).

The division, however, looked not to the quality of the error found but to the quantity of independent evidence supporting appellant's conviction -- "the evidence of guilt

was so clear and strong, however, that we are convinced the verdict was not affected" by the error (Op. 3). By thus concluding that the evidence against appellant could only produce a conviction, the division has in effect directed a verdict against appellant, and has deprived him of his Sixth Amendment right to trial "by an impartial jury."

Judge Wright has written for the Fifth Circuit that even if "the evidence of guilt here is overwhelming", the "harmless error" doctrine can not be employed to deprive defendants of their right to a fair trial. Helton v. United States, 221 F.2d 338, 342 (5th Cir. 1955). And in Nelson v. United States, 93 U.S. App. D.C. 14, 23 n.31, 208 F.2d 505, 514 n.31, cert. denied, 346 U.S. 827 (1953), a division of the Court noted its approval of the decision in Braswell v. United States, 200 F.2d 597 (5th Cir. 1952), which, without reference to the strength of the Government's evidence, reversed a conviction because defendants had assaulted the Marshal and other police officers during trial and in full view of the jury. 1/

1/ Rollerson v. United States, No. 17665, D.C. Cir., October 1, 1964, is not to the contrary, since the defendant there waived his right to reversal by failing to move for a mistrial and by agreeing to the purportedly curative instruction given to the jury. See pp. 15-16 n.14.

These cases make clear that the Court should not, by effectively directing a verdict against a defendant in circumstances like these, deprive the jury of an opportunity to appraise the evidence of guilt free from the contamination of gross prejudice. If a different rule is now to prevail in this Circuit it should be prescribed by the Court en banc and not by a division alone.

3. Errors in the Opinion of the Division. The Court has recognized that the correction of erroneous decisions which might become precedents is a legitimate function of en banc reconsideration. Cafeteria Workers v. McElroy, 109 U.S. App. D.C. 39, 52, 284, F.2d 173, 186 (1960) (en banc), aff'd on other grounds, 367 U.S. 886 (1961). The foregoing portion of this memorandum discusses a number of respects in which we believe the division erred. Others are revealed by the record as well.

First, we submit that the record of appellant's trial amply reveals the unfairness which was engendered by the cumulation of erroneous procedural and evidentiary rulings and of harassing, demeaning, and prejudicial comments regarding appellant's assigned counsel by the District Court. See

Brief for Appellant, pp. 26-35; Reply Brief for Appellant, pp. 4-7; Brief for Appellant, Wynder v. United States, No. 18758, pp. 24-44. The division's silent rejection of this unfairness as a basis for reversal here will constitute a controlling precedent in the pending Wynder case, if allowed to stand. Edwards v. United States, ____ U.S. App. D.C. ____, _____, 330 F.2d 849, 851 n.4 (1964).

Second, the division erred in implicitly condoning the District Court's failure to instruct the jury in the manner prescribed by Pearson v. United States, 117 U.S. App. D.C. 52, 54 n.2, 325 F.2d 625, 627 n.2 (1963), with respect to appellant's pretrial misconduct. The opinion of the division, if permitted to stand, may well undermine the explicit teaching of Pearson, which was intended to serve as a guide for future cases. It is thus precisely the sort of precedent which en banc rehearing is designed to foreclose.

CONCLUSION

Appellant's pro se petition for rehearing en banc should be granted, the case restored to the calendar for briefing and reargument, and appellant's pending application for bail

pending appeal granted. If the Court should determine not to grant the petition at the present time, however, the Court might nevertheless deem it appropriate to hold the petition pending consideration of the appeal in Wynder v. United States, No. 18758, and to order en banc rehearing of either or both appeals in the event that Wynder is decided in a manner inconsistent with the opinion of the division in the present case.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF COUNSEL PURSUANT TO RULE 26(a)

I certify that the foregoing Memorandum is presented in good faith and not for delay.

JOEL E. HOFFMAN
Counsel for Appellant

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18759

LOUIS Y. WILSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR EN BANC REHEARING OF APPELLANT'S
APPLICATION FOR BAIL PENDING APPEAL

Appellant and another were convicted of armed robbery in the United States District Court for the District of Columbia, after a joint trial before District Judge Holtzoff and a jury. On December 10, 1964, appellant applied to this Court for bail pending appeal. The application was supported by a letter to appellant's prior counsel from the Field Supervisor of the District of Columbia Bail Project, which -- in accordance with the Project's usual practice in cases before this Court -- made no recommendation but set forth the facts called for by the

Court's Rule 33(f) to the extent that the Project had ascertained them. On December 17, 1964, before the bail application was acted upon, the Court affirmed appellant's conviction in a per curiam opinion by Judges Fahy, Washington, and Burger. Appellant's pro se petition for rehearing en banc, notarized on December 29, was treated as timely by order of Chief Judge Bazelon and filed on January 4, 1965. On January 21, Chief Judge Bazelon granted appellant's motion (through counsel) for leave to file a Memorandum in support of the pro se rehearing petition. Appellant's bail application was denied on January 26 by the division of the Court which had previously heard and decided the appeal.

Grounds for the Petition

The extraordinary posture of this case warrants the extraordinary step of en banc reconsideration, after the affirmance of appellant's conviction, of his application for bail pending appeal. The pendency of appellant's petition for en banc rehearing of his appeal may, in the unusual circumstances present here, substantially delay a final determination of the validity of his conviction. The potential duration of appellant's future pendente lite detention is therefore

sufficiently lengthy to justify consideration of the bail question by this entire Court, before which the merits of appellant's case are pending.

1. Appellant's en banc rehearing petition and supporting Memorandum raise serious and substantial issues going to the validity of his conviction. Rehearing by this entire Court has been sought on the grounds of (1) the Government's failure to accord appellant his rights to a prompt judicial determination of probable cause for his pre-indictment detention and to a meaningful confrontation of his accusers; (2) the frustration of appellant's attempt to secure review in this Court of the erroneous dismissal of his resulting pretrial habeas corpus petition; and (3) the manifest prejudice, found by the District Court, which was created against appellant when the District Court ordered him presented to the jury and then tried while clad only in blankets and bound with leg irons and manacles. These significant shortcomings in the application of the criminal law to appellant are of a magnitude which warrants their consideration by the Court en banc.

The propriety of rehearing en banc in appellant's case is materially strengthened by the pendency of Wynder v.

United States, No. 18758, the appeal of the codefendant, in which the propriety of trying the two appellants in blankets and chains must again be decided but by a different division of the Court. The unusual circumstance of the identical question being presented on the same set of facts in two separate cases before different divisions,we have argued, is a compelling reason for granting en banc rehearing. The affirmance of appellant's conviction has thus plainly not terminated the proceedings.

2. The clear relevance of the outcome in Wynder to the disposition of appellant's en banc rehearing petition, however, may greatly prolong the period until this appeal is finally concluded. Appellant has requested the Court to withhold action on the rehearing petition, if it is not immediately to be granted, until a decision in Wynder is reached. During this period, whose duration cannot now be known, appellant remains deprived of his liberty even though no valid judgment of conviction has become final. The duration of appellant's preconviction imprisonment will be even longer, moreover, if the pending en banc rehearing petition is finally granted. In the absence of a showing that the grant of bail is likely to result in appellant's escape from the jurisdiction of this

Court, or in jeopardy to the safety of the community, his continued detention for so long, prior to the finality of his conviction, should not be countenanced.

3. Appellant's bail application was denied by the division after it had already affirmed his conviction and the pending en banc rehearing petition had been filed. But appellant submits that the pendency of this appeal before the Court en banc makes appropriate consideration by the entire Court of the bail application as well, notwithstanding the adverse action of the division. For the bail application finds its present justification in the merit of the pending en banc rehearing petition. That merit will necessarily be appraised, under this Court's settled practice, by the Court en banc. To grant the present petition for en banc rehearing of the bail application would thus merely bring the remaining aspects of this proceeding before the entire Court.

Conclusion

The Court should grant en banc rehearing of appellant's application for bail pending appeal, without awaiting disposition of the pending petition for en banc rehearing of the appeal itself. In light of the plain necessity for speedy consideration

of bail applications if meaningful relief is to be granted, and to expedite the Court's consideration of the merits of appellant's bail application, appellant further urges the Court to decide the bail question without additional delay, upon the basis of the application and supporting data previously submitted to the division. In the event that appellant's suggestion for expedition is adopted by the Court, appellant should be admitted to bail in a sum not to exceed $1,000 pending disposition of the pending petition for en banc rehearing of the appeal, or, if that petition is granted, pending disposition of the appeal on rehearing, and in either event pending the conclusion of all subsequent review proceedings.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF COUNSEL PURSUANT TO RULE 26(a)

I certify that the foregoing Petition is presented in

good faith and not for delay.

JOEL E. HOFFMAN
Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that I have this day delivered a copy of the foregoing Petition to David C. Acheson, Esq., United States Attorney, United States Court House, Washington, D.C., counsel for appellee.

JOEL E. HOFFMAN
Counsel for Appellant